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Supreme Court, U.S.
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No. 96-545

In The

Supreme Court of the United States

October Term, 1996

DAVID L. SMITH,

Petitioner,

v.

REGIONAL TRANSPORTATION DISTRICT,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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October 23, 1996

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21 pp

QUESTIONS PRESENTED

Respondent is dissatisfied with petitioner's argumentative presentation of questions. *See* S.Ct. R. 14.1(a) (questions should not be argumentative). Respondent presents the questions as follows:

1. Whether the disqualification and sanction orders against petitioner in this matter were abuses of discretion.

2. Whether the Court of Appeals was obligated to disqualify itself from hearing this matter under 28 U.S.C. § 455(a).

3. Whether the Court of Appeals so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by the District Court, in this matter as to call for the exercise of this Court's power of supervision under S. Ct. R. 10.1(a).

LIST OF PARTIES

Petitioner David L. Smith, a Colorado attorney, wants this Court to overturn the Tenth Circuit's order in *Qualls v. Regional Transp. Dist.*, 91 F.3d 159 (mem.), 1996 WL 412414 (full text of decision) (10th Cir., July 23, 1996), affirming disqualification and sanction orders against petitioner.

The original parties in this case were plaintiff James Edward Qualls and defendants Regional Transportation District, Richard Bauman, Robert Garside, Richard Reynolds, Ellsworth Walker and James Misek. In an August 31, 1992 order the District Court dismissed all defendants except the Regional Transportation District. In an October 10, 1995 order the District Court dismissed plaintiff's complaint with prejudice pursuant to a settlement agreement.

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Respondent Regional Transportation District ("RTD") respectfully requests that this Court deny the petition by David L. Smith ("Smith") for writ of certiorari.

STATEMENT OF THE CASE

I. Nature of Proceeding

This is "but the latest chapter of the continuing saga of attorney David L. Smith." *Howard v. Mail-Well Envelope Co.*, 90 F.3d 433, 434 (10th Cir. 1996).

In this proceeding Smith is asking this Court to overturn the Tenth Circuit's order affirming sanction and disqualification orders in *Qualls v. Regional Transp. Dist.*, 91 F.3d 159 (mem.), 1996 WL 412414 (full text of decision) (10th Cir., July 23, 1996). The District Court and the Tenth Circuit first imposed sanctions against Smith for abusive litigation. Then, when Smith continued to attempt to represent plaintiff James Edward Qualls ("Qualls") after the District Court disciplinary panel had suspended Smith from practice, the District Court disqualified Smith from continuing to represent Qualls.

Smith has neither appended nor even attempted to summarize the orders of which he complains, and has therefore failed to present "with accuracy, brevity and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration. . . . " S. Ct. R. 14.5. This alone is "sufficient reason for denying the petition." *Id.*

RTD respectfully submits that this Court's rules do not require RTD to assume the time and expense of

reproducing the lengthy lower-court orders detailing Smith's sanctionable misconduct in this case. RTD has briefly summarized the orders below. Since Smith is complaining of the orders, he plainly had the duty to append them to his petition. (If this Court wishes RTD to provide such an appendix, RTD will of course promptly do so.)

Smith's statement of the case contains numerous misrepresentations and statements plainly not "material to the consideration of the questions presented." S. Ct. R. 24.1(g). In particular, Smith's complaints about general disciplinary proceedings against him in the Tenth Circuit and the United States District Court for the District of Colorado are not cognizable in this proceeding. *See* Petitioner's Appendix at A-1, A-4, A-8. Indeed, on two previous occasions this Court has already denied Smith's petitions for certiorari review of such proceedings. *See In re Smith*, 76 F.3d 335 (10th Cir. 1996), *cert. denied*, ___ U.S. ___, 65 U.S.L.W. 3223 (Oct. 7, 1996) (disbarring Smith from Tenth Circuit); *In re Smith*, 10 F.3d 723 (10th Cir. 1993), *cert. denied*, ___ U.S. ___, 115 S.Ct. 53, 130 L.Ed.2d 13, *reh'g denied*, ___ U.S. ___, 115 S.Ct. 615, 130 L.Ed.2d 523 (1994) (suspending Smith from Tenth Circuit). Pursuant to S. Ct. R. 15.3, RTD will not address such immaterial matters.

II. Procedural History

This proceeding began as an employment discrimination action filed by Qualls, an RTD bus driver, in June 1991 against RTD and several RTD employees in their official and individual capacities. RTD had fired Qualls for threatening a bus passenger with a knife: Qualls' second episode of threatening passengers within a few

months. A labor arbitrator upheld the discharge, finding that the evidence – including Qualls' *admitted* threat to the passenger to "carve your [testicles] off," as well as testimony from a neutral eyewitness – proved *beyond a reasonable doubt* that Qualls was guilty of the charge. Smith was Qualls' attorney. (Neither Qualls' union nor the arbitrator were named as defendants.)

The following is only a very limited, selective summary of the tortuous proceedings in this matter.

On August 31, 1992, the District Court granted defendants' Fed. R. Civ. P. 12 motions to dismiss all of Qualls' claims except for his Title VII claim against RTD. On September 2, 1992, in a misguided attempt to obtain immediate appellate review, Qualls moved to dismiss his remaining Title VII claim. On September 8, 1992 and December 10, 1992, the District Court ordered that ruling would be reserved on Qualls' motion in order to provide Qualls with an opportunity to reconsider his motion. Ultimately Qualls did reconsider, and withdrew his motion.

Discovery thereupon commenced and quickly became problematic. On July 8, 1993, the United States District Court Magistrate Judge granted RTD's motion for sanctions, finding that Smith had engaged in a wide variety of abusive discovery and litigation tactics. As further discussed below, the Magistrate Judge's order catalogued Smith's misconduct in detail. On August 2, 1993, the District Court denied Smith's motion for reconsideration of the Magistrate Judge's order.

On October 19, 1993, the Magistrate Judge assessed further sanctions against Smith for additional abusive

litigation. On November 4, 1993, the District Court denied Smith's motion for reconsideration of the additional sanctions.

On January 28, 1994, the Magistrate Judge determined that Smith was to pay $8,187.50 pursuant to the above sanction orders. The amount was to be paid by February 28, 1994.

On February 16, 1994, in response to Smith's suspension from practice in the Tenth Circuit Court of Appeals, the District Court stayed proceedings in the case to permit clarification of Smith's District Court status under the District's reciprocal-discipline rules. On March 17, 1994, Smith filed an interlocutory appeal (No. 94-1127) contesting the District Court's stay. On June 17, 1994, the District Court entered an order continuing the stay, and on July 15, 1994 Smith filed a second interlocutory appeal (No. 94-1314) contesting the order continuing the stay.

On September 14, 1994, the Tenth Circuit dismissed Smith's appeal No. 94-1127 as jurisdictionally defective. On October 11, 1994, the District Court lifted its stay. On January 6, 1995, the Tenth Circuit dismissed Smith's second appeal (No. 94-1314) as jurisdictionally defective.

On January 17, 1995, despite the fact that the District Court had *already* lifted its stay *three months earlier*, Smith filed a petition for writ of certiorari in this Court concerning his first appeal of the stay (No. 94-1127). This Court denied Smith's petition, granted RTD's motion for damages and double costs, and awarded RTD $500 as damages and costs. *Qualls v. Regional Transp. Dist.*, ___ U.S. ___, 115 S.Ct. 1328, 131 L.Ed.2d 207, *reh'g denied*, ___ U.S. ___, 115 S.Ct. 1992, 131 L.Ed.2d 878 (1995). When Smith

refused to pay the $500 as ordered by this Court, this Court first granted RTD's motion to show cause, *Qualls v. Regional Transp. Dist.*, ___ U.S. ___, 116 S.Ct. 47, 113 L.Ed.2d 13 (1995), and then disbarred Smith. *In re Smith*, ___ U.S. ___, 116 S.Ct. 510, 133 L.Ed.2d 420 (1995), *reh'g denied*, ___ U.S. ___, 116 S.Ct. 801, 133 L.Ed.2d 420, *m. to recall and amend denied*, ___ U.S. ___, 116 S.Ct. 1257, 134 L.Ed.2d 206 (1996).

Meanwhile, on February 10, 1995, the United States District Court for the District of Colorado suspended Smith from practice. On May 2, 1995, the District Court Disciplinary Panel denied Smith's motion to reconsider the suspension.

On May 15, 1995, the District Court issued orders in this proceeding disqualifying Smith from further representing Qualls due to Smith's suspension, and staying Qualls' District Court case for one month to enable Qualls to obtain new counsel. On June 13, 1995, Smith filed an interlocutory appeal (No. 95-1246) contesting his disqualification.

On July 18, 1995, the Tenth Circuit granted RTD's motion for sanctions and double costs in connection with Smith's second interlocutory appeal (*i.e.*, No. 94-1314, the appeal of the order merely continuing the stay), and remanded the matter to the District Court to determine the amount of attorney fees on appeal to be awarded.

On July 31, 1995, the District Court denied Smith's motion for reconsideration of the Magistrate Judge's January 28, 1994 order awarding $8,187.50 in sanctions for abusive discovery and litigation tactics in District Court.

On August 10, 1995, pursuant to the Tenth Circuit's July 18, 1995 order, the District Court awarded further sanctions of $1,187.50 against Smith for filing a frivolous appeal.

On August 30, 1995, Smith filed his fourth interlocutory appeal in this matter (No. 95-1385).

On September 29, 1995, Qualls and RTD settled Qualls' claims. On October 10, 1995, pursuant to the settlement agreement, the District Court dismissed Qualls' complaint with prejudice.

On October 27, 1995, Smith filed a fifth notice of appeal (No. 95-1459). On November 24, 1995, Smith filed a sixth notice of appeal (No. 95-1489).

On April 12, 1996, the Tenth Circuit dismissed appeal No. 95-1246 and consolidated the three remaining appeals (Nos. 95-1385, 95-1459, and 95-1489). On July 23, 1996, the Tenth Circuit affirmed the disqualification and sanction orders, dismissed all remaining contentions, and denied Smith's petitions for writ of mandamus or prohibition. On August 29, 1996 the Tenth Circuit denied Smith's petition for rehearing.

Smith has never paid any of the sanctions assessed against him in this and other proceedings brought by him against RTD.

SUMMARY OF ARGUMENT

No reasons exist for granting the writ. *See* S. Ct. R. 10.1. To the contrary, the Court should summarily deny the petition.

In his two-paragraph argument, Smith merely asserts – with no explanation whatsoever – that the sanction and disqualification orders were "harsh and unjustified" and that the District Court judge was "demonstrably biased" and had engaged in "judicial misconduct." Smith's failure to supply this Court with the orders in question, or even a semblance of an argument as to *why* or *how* the orders were in any way improper, is a compelling reason to deny the petition. S. Ct. R. 10.5.

Smith further asserts that the Tenth Circuit's impartiality is reasonably in question, and that the Tenth Circuit was therefore "obligated" to disqualify itself from the case pursuant to 28 U.S.C. § 455(a), "because of its previous orders and judgments imposing harsh and unjustified sanctions against Smith, and its refusal to provide a statement of reasons, addressing the issues raised and briefed on appeal. . . . " However, it is well-recognized that disqualification is "almost never" required merely because the court has previously ruled against a litigant. *Liteky v. United States*, 510 U.S. 540, 114 S.Ct. 1147, 1157, 127 L.Ed.2d 474, 490 (1994).

ARGUMENT

I. The Lower Courts' Orders Were Not Abuses of Discretion

A. The District Court's December 10, 1992 Order Was Appropriate

Disregarding Smith's complaints concerning disciplinary action against him (which are not reviewable in

this proceeding), Smith first appears to be seeking certiorari review of the District Court's December 10, 1992 order on the ground that the order allegedly constituted improper "sanctions" as well as "unsubstantiated attacks on his professional character, judgment and reputation." *See* Petition at 6.

After the District Court had dismissed all but Qualls' Title VII claim, Smith first moved to dismiss the remaining Title VII claim without prejudice so that he could immediately appeal the dismissal order. After the District Court in a September 8, 1992 order noted that recent Tenth Circuit caselaw appeared to foreclose an immediate appeal under such circumstances, Smith moved to dismiss his client's remaining Title VII claim *with prejudice* in order to take an immediate appeal of all claims. In its polite and reasonable December 10, 1992 order, the District Court understandably sought further confirmation "that plaintiff understands that he may be relinquishing his right to assert a Title VII claim, even in the event his other claims are reinstated by the Tenth Circuit." The District Court also "cautioned" Smith concerning his on-the-record refusal to read cases cited by the Court and "the tenor of counsel's complaints regarding the propriety of the decisions made by Judges in this District and the Tenth Circuit. . . . "

Ultimately Smith and Qualls did in fact reconsider their motions to dismiss the Title VII claim.

These District Court orders were, if anything, a favor to Smith and his client. Had the District Court granted

Smith's motion to dismiss with prejudice Qualls' remaining Title VII claim, Qualls would thereupon have permanently relinquished his Title VII claim even if Qualls had prevailed in seeking reversal of the District Court's other holdings. Moreover, Smith has failed to explain how any of the statements by the District Court in its order were in any way erroneous, or how they could reasonably be considered "sanctions" or an "attack" on Smith's character, judgment or reputation.

B. The District Court's Sanctions Against Smith Were Justified

The District Court's reasons for imposing sanctions against Smith were set forth in exhaustive detail in the Magistrate Judge's July 8, 1993 order. Among other things, Smith had (to quote from the 20-page order):

- "misled the Court, wasted defense counsel's time, and cost the deponents time and money" by unilaterally cancelling depositions of defendants within three hours after a court hearing in which the Magistrate Judge had set dates and times for the depositions;
- filed "plainly overbroad" and "absurd" requests for production;
- "violated Fed. R. Civ. P. 11 through his pleadings, conduct in court, conduct toward opposing counsel and actions toward the court";
- continually filed motions "without legal authority and with faulty legal reasoning, if any at all";
- "misstat[ed] facts, fail[ed] to cite authority and [failed to be] responsive to Court

inquiries," thus demonstrating "insolence" during oral argument;

- "insisted that he needed documents before he could proceed with . . . depositions when nineteen personnel files had been sitting at RTD's office for Mr. Smith to inspect but he had not yet done so";
- contended that "a Magistrate Judge's decision is not authority";
- "misstated Defendant's objections to discovery as privilege objections, when they clearly were not";
- claimed that he "repeatedly" gave the Magistrate Judge information during oral argument "when the transcript clearly shows otherwise";
- "continuously misrepresented what opposing counsel had just argued minutes before" in oral argument;
- "taken attorney congeniality, cooperation and civility to a new low" by failing to cooperate with opposing counsel on scheduling and other matters; and
- "refused to address correspondence to new lead counsel [for defendant] until this Court ordered him to do so."

Aside from making conclusory assertions that the sanctions against him were "harsh and unjustified," Smith has utterly failed before the District Court, the Tenth Circuit, and now this Court to explain *why* or *how* the Magistrate Judge's July 8, 1993 order, and the above findings of fact, were in any way incorrect let alone an

abuse of discretion sufficient to justify reversal on appeal. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990) (standard of review of Fed. R. Civ. P. 11 sanctions is abuse of discretion).

Smith claims that the District Court "grossly abused" its discretion or otherwise acted improperly by allegedly "rubber-stamping" the Magistrate Judge's sanction order. Petition at 9. However, Smith has failed to explain why the District Court's order denying his motion for reconsideration of the above sanctions was incorrect.

When the Magistrate Judge thereafter fixed the amount of sanctions at $8,187.50, the Magistrate Judge explained why this amount was appropriate. The amount was supported by an affidavit of fees. Smith bore the burden to explain how the Magistrate Judge's orders were in any way erroneous, but he has never done so before any court.

Finally, the District Court was not required to vacate previously-imposed sanctions when the underlying case was settled. *See U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, ___ U.S. ___, 115 S.Ct. 386, 393, 130 L.Ed.2d 233 (1994) (settlement of case on appeal does not entitle parties to order vacating lower-court judgment which is subject of appeal); *Dunkin v. Louisiana-Pacific Corp.*, 159 F.R.D. 554, 555 (D. Colo. 1995) (another case involving Smith; parties may not, as part of settlement, agree to vacate sanctions against Smith).

C. The District Court's May 15, 1995 Orders Disqualifying Smith from Representing Qualls Were Justified

Smith argues that the District Court's May 15, 1995 disqualification orders must be overturned because the District Court disciplinary panel's February 10, 1995 order suspending him from practice "did not permit removal of Mr. Smith as attorney for his clients in pending civil rights litigation." Petition at 7. The argument is groundless, frivolous and patently absurd. After he was suspended from practice in the District Court, Smith obviously was obliged to cease representing clients in pending civil rights litigation in that court. Unfortunately, Smith failed to recognize his duty to withdraw as counsel of record after he was suspended from practice, and the District Court was therefore forced to bar Smith from further representing Qualls in this proceeding. (In fact, Smith admittedly continued to "ghost-write" Tenth Circuit briefs for Qualls and other clients in plain violation of the Tenth Circuit's suspension order; he was ultimately disbarred by the Tenth Circuit for that reason.)

D. The Appellate Sanctions Were Justified

In awarding further sanctions of $1,187.50, the District Court was merely obeying the Tenth Circuit's July 18, 1995 order in appeal No. 94-1314 imposing sanctions against Smith.

Smith does not explain why the Tenth Circuit's order was erroneous. The appeal – of an order continuing a stay which had already been appealed – was dismissed as plainly jurisdictionally defective. Moreover, by the time

of this appeal Smith had already been suspended from practice in the Tenth Circuit, yet he was still preparing and filing matters in the Tenth Circuit as Qualls' attorney.

Given the amount of work necessitated by any appeal, an award of $1,187.50 in sanctions could hardly be classified as unreasonable. The amount was supported by an affidavit of fees.

II. The Tenth Circuit Was Not Obligated to Disqualify Itself

Smith claims that the entire Tenth Circuit was required to disqualify itself pursuant to 28 U.S.C. § 455(a) because the impartiality of the Circuit's member judges might reasonably be questioned. However, Smith has failed to provide any rational explanation for his claim.

The only basis cited by Smith for questioning the Tenth Circuit judges' impartiality in this matter is the Tenth Circuit's "previous orders and judgments" against Smith. Petition at 11. He has cited no extrajudicial sources of alleged bias. However,

> judicial rulings alone almost never constitute valid basis for a bias or partiality motion. . . . In and of themselves (*i.e.*, apart from surrounding comments or accompanying opinion), they cannot possibly show reliance upon an extrajudicial source; and can only in the rarest circumstances evidence the degree of favoritism or antagonism required . . . when no extrajudicial source is involved. Almost invariably, they are proper grounds for appeal, not for recusal.

Liteky v. United States, 114 S.Ct. at 1157.

Smith has provided no explanation as to why this case should be an exception to the above rule.

III. This Court's Supervisory Power Is Not Required

Smith has failed to articulate any reasonable basis for his extraordinary request that this Court exercise its supervisory powers under S. Ct. R. 10.1(a). Smith's stated basis for invoking the Court's supervisory power is the Tenth Circuit's "failing or refusing to disqualify itself from the case. . . . " Petition at 11. However, as shown above, there is no basis for disqualification of the Tenth Circuit.

IV. Request for Award of Just Damages and Double Costs

Smith has made grave accusations of "judicial misconduct" and "demonstrable bias" by the District Court with no reasonable explanation and no proffered evidence. Smith has also failed to provide any rational basis for his demand that the entire Tenth Circuit disqualify itself, or that this Court exercise supervisory jurisdiction over the Tenth Circuit.

This is the second frivolous and groundless petition for certiorari which Smith has filed in this matter. Smith was disbarred by this Court for refusing to pay the $500 in sanctions assessed by this Court for his first petition. Even though this latest petition is again meritless, RTD nevertheless has an obligation to respond pursuant to

S. Ct. R. 15.1. RTD therefore again requests an award of just damages and double costs pursuant to S. Ct. R. 42.2.

CONCLUSION

For the reasons presented above, RTD requests that the Court deny certiorari and award RTD just damages and double costs.

Respectfully submitted,

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